3-29-2013

State v. Vaughn Appellant's Reply Brief Dckt. 39526

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Respondent, vs. CHARLES VAUGHN, Appellant.	)	S.Ct. No. 39526/40237 Ada County Ct. No. CR-2009-14391

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE CHERI COPSEY
District Judge

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A. The District Court Abused its Discretion in Denying the Rule 35 Motion

In denying Mr. Vaughn's Rule 35 motion, the district court wrote:

> The Court found that the magnitude of this crime outweighed Vaughn's character and background. Therefore, the Court found that this sentence would promote rehabilitation; there is a need for some punishment that fits the crime before real rehabilitation will be effective. Finally, the Court finds that the crime itself simply deserves this punishment. It is a serious crime. The Court finds that this sentence fulfills the objectives of protecting society and achieves deterrence, rehabilitation and retribution and therefore denies Vaughn's Motion for Reconsideration.

R 40237, p. 115.

In his Opening Brief on appeal, Mr. Vaughn has set out, with citations to supporting case law, that in Idaho sentences are to be imposed having in regard both the nature of the offense and the character of the offender. Appellant's Opening Brief at pages 17-20, citing *State v. Wolfe,* 99 Idaho 382, 384, 582 P.2d 728, 730 (1978), overruled on other grounds, *State v. Coassolo,* 136 Idaho 183, 140-41, 30 P.3d 293, 295-96 (2001); *State v. Weise,* 75 Idaho 404, 411, 273 P.2d 97, 114 (1954); *State v. Powell,* 71 Idaho 131, 227 P.2d 582 (1951), overruled in part by *State v. White,* 93 Idaho 153, 456 P.2d 797 (1969); and *State v. Justice,* 152 Idaho 48, 266 P.3d 1153 (Ct. App. 2011). The state does not dispute that the case law requires that sentences be imposed having in regard both the nature of the offense and the character of the offender. Respondent's Brief at pages 6-8.

As set out in Mr. Vaughn's Opening Brief at pages 19-21, a district court cannot conclude except in the most egregious of cases (including matricide and infanticide, *State v. Windom,* 150 Idaho 873, 876, 253 P.3d 310, 313 (2010); *State v. Stevens,* 146 Idaho 139, 191 P.3d 271 (2008))

that the nature of the case "outweighs" the character of the defendant so as to require a sentence imposed based solely on the nature of the offense. Yet, that is what happened in this case. The district court's reasoning is demonstrated in its statement that "The Court found that the magnitude of this crime outweighed Vaughn's character and background." R 40237, p. 115. The district court is not to weigh character against magnitude of the crime and when it finds magnitude of the crime the more weighty, impose sentence without regard to character.

The district court's reasoning is further demonstrated by its statement, "the Court finds that the crime itself simply deserves this punishment. It is a serious crime." R 40237, p. 115. Again, the district court is not to decide that the facts of a particular crime by themselves "simply deserve" a certain punishment. Rather, the Court is to look at both the nature of the offense and the character of the offender.

The Respondent does not address these statements by the district court in its brief. Respondent's Brief at pages 6-8. Rather, the Respondent notes that the district court "considered all the things [Vaughn] . . . argued in his Rule 35." Respondent's Brief at page 7, quoting R 40237, p. 113.[1] But, this statement is inconsistent with what the judge stated in imposing sentence - that "the magnitude of this crime outweighed Vaughn's character and background" and that "the crime itself simply deserves this punishment." R 40237, p. 115.

The record demonstrates that the district court did not properly consider *both* the nature of the offense and the character of the offender in imposing sentence and in denying Rule 35

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[1] Also, as discussed in the second paragraph on page 20 of Mr. Vaughn's Opening Brief, this quote read in full and not ellipsed as in the state's brief, actually suggested that the Court was stating that it considered the Rule 35 mitigation information at the time of the original sentencing which would have been impossible.

relief. Rather, the court found the nature of the offense eclipsed consideration of the character of the offender. This was an abuse of discretion which requires that the order denying Rule 35 relief be reversed.

For the reasons set forth in the Opening Brief at pages 17-21, Mr. Vaughn further requests that this Court review the totality of the record including the material supplied in support of the Rule 35 motion and grant the motion by reducing Mr. Vaughn's fixed time to no more than three years. *See State v. Justice,* 152 Idaho 48, 266 P.3d 1153 (Ct. App. 2011).

B. The District Court Abused its Discretion in Denying the Motion to Modify the No Contact Order

Mr. Vaughn has set out in his Opening Brief at pages 21-25 how the district court abused its discretion in the denial of the motion to modify the no contact order. The state has agreed that the standard of review is whether the district court abused its discretion as set out in *State v. Cobler,* 148 Idaho 769, 771, 229 P.3d 374, 376 (2010). Appellant's Opening Brief at page 22; Respondent's Brief at page 9.

Mr. Vaughn has set out that the district court abused its discretion insofar as it misunderstood the record before it. Appellant's Opening Brief at page 22. Specifically, in denying the motion to modify the no contact order, the district court stated that Mr. Vaughn had threatened to kill W. Tr. 12/14/11, p. 10, ln. 22-25, cited at page 16 of Appellant's Opening Brief. Mr. Vaughn, citing PSI pp. 2-3, has noted that the record does not support this statement by the district court. Appellant's Opening Brief pages 16, 22. The state has cited to p. 39 of the PSI to argue that the record does support this statement. At page 39, a police report states that K (another child belonging to Tiffany) told the officer, "That's what he (Chuck) was telling my

momma. If [redacted] didn't tell him the truth, and [redacted] was telling him the truth, and if he doesn't, he would kill all of us." However, the report does not clarify who "all of us" is and does not state that this group includes W.

Another example of the district court's misunderstanding of the record before it, set out in Mr. Vaughn's Opening Brief, is that in denying the motion to modify the no contact order, the district court stated that Mr. Vaughn had a long history of violence against intimate partners. Tr. 12/14/11, p. 11, ln. 6-8, cited at page 16 of Appellant's Opening Brief. The exact quote from the district court is "And, furthermore, this is a man who has a long history of violence against intimate partners." Tr. 12/14/11, p. 11, ln. 6-8. While the state appears to maintain that the record supports this statement by the district court, Respondent's Brief at page 14, it does not cite to anywhere in the record wherein there is a demonstration of a long history of violence against intimate partners. The state likely does not cite to anything in the record to support its claim because there is nothing in the record about a long history of violence against intimate partners. Rather, the record includes a statement from Mr. Vaughn's first wife that he had never been violent towards her. R 40237, pp. 33-34. And, there is nothing in the record to indicate any other intimate partners besides Tiffany Vaughn and Kathy Marie Vaughn (Mr. Vaughn's first wife). R 40237, pp. 33-34; PSI p. 8. There simply does not appear in the record any indication of a long history of violence towards intimate partners.

Mr. Vaughn has also pointed out that the district court expressed an incorrect recollection that Mr. Vaughn had previously asked the court to order him and his wife to reconcile. Appellant's Opening Brief pages 16, 22, citing Tr. 12/14/110, ln. 9-11; PSI p. 22; Tr. 10/28/09, and Tr. 12/30/09. The state does not assert that the record supports the district court's

recollection of a request for an order to reconcile. Respondent's Brief at page 15. Rather, the state argues that even if the district court did not remember the record accurately, any error was harmless. Respondent's Brief at page 15. However, the fact remains that the district court misapprehended the record before it. And, a court cannot reach its decision by an exercise of reason when the court is acting on a mistaken understanding of the record. *Sun Valley, Shopping Ctr., supra.* "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Young v. Williams,* 122 Idaho 649, 652, 837 P.2d 324, 327 (Ct. App. 1992).

Mr. Vaughn has also set out that the district court did not act within the boundaries of its discretion because it did not act consistently with the constitutional right to parent one's own children. Appellant's Opening Brief pages 22-24. The state does not assert that Mr. Vaughn has not correctly set out the law relative to the fundamental right to parent one's own children. Nor does the state assert that the district court did consider the constitutional limitations on its power to eliminate all contact between Mr. Vaughn and his daughter. Nor does the state assert that the district court's refusal to modify the no contact order did not violate the Fourteenth Amendment due process right to family integrity or to familial association. *United States v. Wolf Cub,* 699 F.3d 1083, 1091 (9th Cir. 2012). Respondent's Brief at pages 15-16. Rather, the state argues only that the violation of the constitutional right cannot be raised for the first time on appeal. Respondent's Brief p. 16.

However, the state's argument rests on a misapprehension of the abuse of discretion standard. *State v. Cobler, supra*, controls. As set out in *Cobler,* the decision to modify a no contact order is within the sound discretion of the district court. The test for determining

whether a court abused that discretion is (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *Cobler,* 146 Idaho at 771, 229 P.3d at 376.

In *Cobler,* the defendant filed a *pro se* motion seeking to modify a no contact order to remove his children from its coverage, and after its denial, a *pro se* motion seeking reconsideration. Mr. Cobler did not base his request for modification on the fact that the no contact order did not have an expiration date. Rather, he was seeking to have his children removed from the order. 146 Idaho at 772, 229 P.3d at 377.

Nonetheless, the Supreme Court found that the district court had abused its discretion in not realizing that the perpetual order it had issued violated ICR 46.2 which requires all no contact orders to have an expiration date. The Supreme Court did not base its finding that there was an abuse of discretion on whether Mr. Cobler had correctly noted the expiration date problem before the district court. In fact, Mr. Cobler probably did not note this as the Supreme Court pointed out that the district court itself had reason, but not excuse, to not know that the lack of an expiration date was problematic:

> . . . While the district court did not have the benefit of our decision in *State v. Castro,* 145 Idaho 173, 177 P.3d 387 (2008), at the time the motion [to modify] was denied, in that case we disapproved of no contact orders with 'eternal existence' and indicated that all no contact orders issued after July 1, 2004, should have termination dates, regardless of whether a motion to modify or terminate the no contact order is granted. *Id.* at 175-76, 177 P.3d at 389-90. The district court should have observed that, without a termination date, the no contact order would, unless modified, have perpetual existence because, based upon the disposition of the case, it would never be dismissed.

> Thus, the district court abused its discretion in basing the denial of the order on the apparent ground that the order was to remain in effect until the dismissal of the case. The court neither acted consistently with the legal standards applicable to the specific choices available to it nor did it reach its decision by an exercise of reason. . . .

148 Idaho at 772, 229 P.3d at 377 (footnote omitted).

To act within its discretion, the district court has to act consistently with the legal standards applicable to the specific choices available to it. *Id.* In this case, the district court did not act consistently with the constitutional limitations on state inference with the parent/child relationship. The state offers no argument to the contrary - which reading its brief closely appears to be a concession, if not absolute at least tantamount to being one, that the court did not act within the confines of the Fourteenth Amendment. *See, Vannoy v. Uniroyal Tire, Co.,* 111 Idaho 536, 660, 726 P.2d 648, 660 (1985), Huntley, J., concurring in part and dissenting in part. As set out in Mr. Vaughn's Opening Brief at pages 22-24, the district court did not limit the no contact order to that reasonably necessary to accomplish the essential need of the state, specifically limiting any interference with Mr. Vaughn's relationship with W to that reasonably necessary to protect W from harm by Mr. Vaughn. *Wolf Child,* 699 F.3d at 1091-92; *State v. Letourneau,* 100 Wash.App. 424, 441, 997 P.2d 436, 446 (2000).

Therefore, this Court should reverse the order denying modification of the no contact order and modify it to allow Mr. Vaughn telephone and written contact with W.

In the alternative, this Court may address the error in not considering the constitutional limitations on interference with the parent/child relationship in denying the motion to modify the no contact order as fundamental error. *State v. Perry,* 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

> In summary, where an error has occurred at trial and was not followed by a contemporaneous objection, such error shall only be reviewed where the defendant demonstrates to an appellate court that one of his unwaived constitutional rights was plainly violated. If the defendant meets this burden then an appellate court shall review the error under the harmless error test, with the defendant bearing the burden of proving there is a reasonable possibility that the error affected the outcome of the trial.

Id.

Although *Perry* speaks in terms of trial errors, its fundamental error analysis has been applied to post-trial proceedings. *State v. Longest,* 149 Idaho 782, 241 P.3d 955 (2010), applying *Perry* fundamental error analysis to a claim of breach of the plea agreement as to sentencing recommendations; *State v. Gomez,* ___ Idaho ___, 281 P.3d 90 (2012), applying *Perry* fundamental error analysis to a claim that a restitution order was improperly entered; and *State v. Reid,* 151 Idaho 80, 88, 251 P.3d 754, 762 (Ct. App. 2011), applying *Perry* fundamental error analysis to the question of whether Reid's due process rights were violated by considering certain information at sentencing. Most recently, *State v. Clinton,* ___ Idaho ___, ___ P.3d ___, 2012 WL 3569687 (Ct. App. 2012), *pet. for rev. granted,* held that "*Perry's* fundamental error standard is not restricted only to claimed errors occurring at trial[.]"

The standard for fundamental error is:

> [I]n cases of unobjected to fundamental error: (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most cases) that it must have affected the outcome of the trial proceedings.

Perry, 150 Idaho at 226, 256 P.3d at 978 (footnote omitted).

As set out in Appellant's Opening Brief at pages 22-24, and not disputed by the state

(Respondent's Brief at pages 15-16), Idaho has long recognized the fundamental constitutional right to parent one's own children. *State v. Doe,* 144 Idaho 534, 536, 164 P.3d 814, 816 (2007), held that a magistrate court's error in applying an incorrect standard in a termination of parental rights case affected Doe's fundamental right to raise his own child and violated the due process clause of the Fourteenth Amendment. *See also, Leavitt v. Leavitt,* 142 Idaho 664, 670, 132 P.3d 421, 427 (2006), affirming that a parent's right to custody, care and control of his or her child is a fundamental liberty right protected by the Fourteenth Amendment and that the liberty interest includes the parent's right to determine with whom his or her child may associate.

This constitutional right to parent one's own child includes the right to contact with one's own child. *Doe, supra. See also, Wolf Child,* 699 F.3d at 1087, holding that the fundamental right to familial association is a "particularly significant liberty interest" and that limits imposed as a result of a criminal conviction must be no greater deprivation of liberty than reasonably necessary. *See also, State v. Letourneau, supra*, holding that a term in a no contact order limiting the fundamental right to contact with and parenting of one's own children impacts the constitutional right and must be limited to that reasonably necessary to accomplish the essential need of the state which is the need to protect the child from harm by the parent, not the need to punish the parent.

In this case, the unwaived constitutional right is the due process right to contact with one's own child. *See Doe, supra,* applying fundamental error analysis to a termination case, noting that while a termination is not a criminal case, the error affects a fundamental constitutional right.

Thus, the first prong of *Perry* is satisfied.

The second prong is that the error is clear and obvious without need for additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision. In this case, the motion requesting modification of the no contact order was drafted *pro se.* R 39526 p. 8-14. A public defender argued the motion on Mr. Vaughn's behalf, but the defender candidly admitted that he was given the file just moments before the hearing on the motion. Tr. 12/14/11, p. 5, ln. 17. There could be no possible tactical reason not to raise the constitutional claim to support the motion to modify the no contact order. If the court accepted the argument, the order would be modified, which was Mr. Vaughn's clear desire. If the court rejected the argument, there was no possible prejudice, and there would have been a clearly valid appellate issue. Undoubtedly the only reason the constitutional claim was not argued was that Mr. Vaughn is not an attorney and did not know that he had a constitutional claim and that the public defender was arguing the motion on the fly and was not aware of the constitutional implications. Given there was no possible tactical reason for not raising the constitutional argument, the constitutional error is reviewable under fundamental error. *See McKay v. State,* 148 Idaho 567, 571, 225 P.3d 700, 704 (2009), finding that there could be no conceivable tactical justification for a failure to object to a jury instruction which omitted the only disputed element in the case.

Thus, the second prong of *Perry* is satisfied.

The third prong is that error affected the defendant's substantial rights. Mr. Vaughn's Opening Brief sets out that the district court erred in not conforming its decision to the constitutional limitations imposed on governmental interference with the fundamental right to parent one's own child. Appellant's Opening Brief at pages 22-24. He pointed out that the court

did not justify its decision to deny him written and telephone contact with W as necessary to meet the essential needs of the state to protect W. Appellant's Opening Brief at page 24.

The state has asserted that the record contains a "myriad of reasons why" allowing Mr. Vaughn telephone and written contact with W was not in her best interests. The state says that these reasons include the facts of the present case, Mr. Vaughn's history of domestic violence and his history of violating no-contact orders to manipulate or harm W's mother. Respondent's Brief at page 15.

The state does not explain how the facts of this case establish that denial of written and telephone contact with W is necessary to meet the essential needs of the state to protect W. Mr. Vaughn certainly cannot physically harm W by writing her a letter or talking to her on the telephone. Nothing in the facts of the case indicate that the mere sound of his voice or the sight of his handwriting will cause W harm. The state's argument that the facts of the offense are alone enough to deny written and telephone contact is misplaced.

Likewise, although the state references a history of domestic violence, it does not give any information as to the scope of this history beyond the conviction in this underlying case. Respondent's Brief at page 15. According to the PSI, Mr. Vaughn has no prior domestic violence related convictions. He had a charge in July 2002 in Florida. PSI p. 4. However, the disposition was nolle prossed - while the district court referred to this as a prior domestic violence case, it was dismissed per the state's motion. Tr. 12/14/11, p. 15, ln. 18. Likewise, the district court referenced a 2007 domestic violence case. Tr. 12/14/11, p. 15, ln. 18. However, the PSI shows that the state of Florida declined to take any action on the case. PSI p. 5. Other than the present case in Idaho, Mr. Vaughn did not have a history of domestic violence

convictions.

Insofar as the state is arguing at page 15 of its brief that Mr. Vaughn had prior domestic violence convictions that justify denying him all written and telephone contact with his daughter in order to protect his daughter, the state misunderstands the record. Insofar as the state is arguing that the facts of the present case demonstrate that Mr. Vaughn being able to talk to his daughter or write her a letter will present a danger to her, the state's argument is misplaced.

Lastly, the state references a "history of violating no-contact orders to manipulate or harm W.V.'s mother." Respondent's Brief at page 15. However, the state does not give any citation to the record to support this claimed history. *Id.* And, even if there was a history of violating no contact orders to manipulate or harm W.V.'s mother, which Mr. Vaughn does not concede exists, the state has offered no argument as to why such a history would mean that telephone and written contact between Mr. Vaughn and W would be contrary to the state's essential interest in protecting W. And, again, it is difficult to see how with W living in Florida and Mr. Vaughn living in prison in Idaho, telephone and written contact between father and daughter could possibly pose a threat of harm to daughter.

Whether this Court finds an abuse of discretion or fundamental error, the order denying the motion to modify the no contact order should be reversed and telephone and written contact allowed between Mr. Vaughn and his daughter.

III. CONCLUSION

For the reasons set forth in the Opening Brief and above, Mr. Vaughn asks that this Court reverse the order denying his Rule 35 motion and grant him relief by reducing the fixed portion of his sentence to two years. He further requests that this Court reverse the order denying

modification of the no contact order and modify the order to allow him telephone and written contact with his daughter.

Respectfully submitted this 29th day of March, 2013.

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CERTIFICATE OF SERVICE

I CERTIFY that on March 29, 2013, I caused two true and correct copies of the foregoing document to be:

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